1996

State of Utah v. Deano R. Alires : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Appellee,	:	
v.	:	
DEANO R. ALIRES, Defendant/Appellant.	:	Case No. 960259-CA Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for attempted possession of methamphetamine, a class A misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1997), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
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STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The fourth amendment to the federal constitution provides:

> **[Unreasonable searches and seizures.]**
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 14 of the Utah Constitution provides:

> **Sec. 14. [Unreasonable searches forbidden -- Issuance of warrant.]**
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

ARGUMENT

POINT I. MR ALIRES' CLAIMS ARE PRESERVED, HAVE NOT BEEN ADDRESSED BY THE STATE ON THE MERITS, ARE MERITORIOUS, AND MANDATE REVERSAL.

A. MR. ALIRES' MOTION TO SUPPRESS, COUPLED WITH HIS CONDITIONAL GUILTY PLEA, ADEQUATELY PRESERVE ALL OF HIS FOURTH AMENDMENT CLAIMS.

Pursuant to Rule 11(i), Mr. Alires pled conditionally guilty, preserving the denial of his motion to suppress evidence seized from the vehicle he was operating. R. 178-85. Mr. Alires argued that the seizure was unconstitutional, and has appealed the trial court's ruling to the contrary. No waiver has occurred. All issues are preserved.

B. THE STATE'S WAIVER ARGUMENT IS FACTUALLY UNSUPPORTED.

The State responds to Mr. Alires' scope of detention argument with the unsupported claim that the argument he is making is in fact a probable cause to arrest claim which was not made below and is thus waived. The State cites no authority for the proposition that it may redesignate an appellant's claims for its own convenience in responding on the merits. The State seeks to erect its own strawman and knock it down, rather than respond on the merits.

Mr. Alires' opening brief was not written in code; each of the "purported"[1] claims he makes are *bona fide*. They say what they say. Issue I is a claim that Trooper Rapich exceeded the scope of the traffic stop when he began questioning about weapons and contraband without a reasonable suspicion.

Scope of detention was specifically raised below during the suppression hearing:

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[1]See State's brief at the heading of Point I ("DEFENDANT'S PURPORTED CHALLENGE TO THE SCOPE OF HIS DETENTION . . .").

> He's detained for a period of five minutes. There are no citations that are written at that point, there's no confirmation from dispatch, there's nothing done to initiate the ticket writing-process. And after a five-minute period of time, your inquiry into a completely different area involving weapons, and maybe illegal items that may have been placed in the vehicle.
>
> Would Mr. Alires have been free to leave after he'd been written a ticket? He may very well have been. There are circumstances, I suspect, where he may have been written a ticket during that five-minute period of time, and then be allowed to leave.
>
> What would have happened to the vehicle, I suppose, is speculation. ***But the point is, at the point that they begin asking him permission to search, a five-minute period of time, and nothing has been done to initiate or complete the stop.***
>
> ***And we would suggest at that period of time that they have exceeded the scope of their authority by not doing that*** . . .

R. 241 (emphasis added). See also R. 238 ("Number two, was voluntary consent given at a time when the police had a right to detain Mr. Alires?").

This case is before this court pursuant to a conditional guilty plea, whereby the State, as a party to the agreement, stipulated, promised, and agreed that Mr. Alires could raise the denial of his motion to suppress in an appeal to this Court. See R. 178-85 (statement of defendant, certificate of counsel and order). Implicit in this agreement is that all matters argued with respect to the preserved motion are preserved, and the State will address the issues on the merits. An appellant's offer to plead conditionally guilty

> cannot be enforced until the condition he relied on is satisfied. For this reason, the court of appeals' decision to enforce a conviction reached on the basis of Rivera's conditional plea while refusing to review [his preserved issue] is unfair and therefore contrary to the public policy . . .

State v. Rivera, 323 Utah Adv. Rep. 22, 23 (Utah 1997). The State cannot stipulate and agree to review at the trial court level, and then claim waiver in this Court.[2] Mr. Alires' claims must be addressed on the merits.

Mr. Alires' first claim is not a probable cause to arrest claim; it is a scope of detention claim. Although couched in the terminology of waiver, what the State is attempting to do is both respond to Mr. Alires scope of detention claim on the merits by asserting that the officer had probable cause to arrest prior to the search, and simultaneously preclude Mr. Alires from responding to this contention by claiming waiver. Waiver jurisprudence does not require an appellant to anticipate every argument the State might make in its brief and respond to those arguments in the trial court. Instead, the rules expressly allow an appellant to file a reply brief. Mr. Alires has not waived his opportunity to file a reply brief responding to the State's arguments, and does so here.

C. ON THE MERITS, MR. ALIRES' SCOPE OF DETENTION CLAIM WARRANTS REVERSAL.

The State's merits argument on the scope of detention issue consists of a single sentence: "Indeed, there is no scope of detention issue in this case." State's brief at 12. On the contrary, as set forth in Mr. Alires' opening brief at Point I, pp. 7-13, Trooper Rapich's questioning concerning weapons and

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[2]Arguably, the State's waiver argument here is a breach of the plea agreement. However, Mr. Alires does not seek recision of his plea agreement. He wants the merits review before this Court that was promised by both the prosecutor and the trial court.

contraband and search for those items, all without reasonable suspicion, exceeded the scope of the legitimate traffic stop. The State has refuted none on the numerous cases relied upon by appellant, nor distinguished this case factually. This Court should reverse.

D. THE STATE'S APPARENT CONTENTION THAT TROOPER RAPICH HAD PROBABLE CAUSE TO ARREST PRIOR TO THE SEARCH IS NOT WELL TAKEN.

Implicit in Mr. Alires' scope of detention claim is the fact that, at the time the search was performed, the officer did not have probable cause to arrest him. See opening brief at p. 8 ("Mr. Alires' statement that his license was suspended raised a reasonable suspicion of that violation as well, justifying further inquiry into that matter."). In the trial court, appellant took exception to the State's proposed finding that the officer had probable cause to arrest prior to the search. R. 56.[3] There are no waiver issues here.

Mr. Alires will treat the State's brief as a merits contention that Trooper Rapich had probable cause to arrest prior to the search. This is not so.

Mr. Alires was pulled over for a class C misdemeanor registration/equipment violation, not having a front license plate on the vehicle. See Utah Code Ann. § 41-1a-404 (1993) (front

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[3]"Mr. Alires takes exception to conclusion of law Number 6 which states '[t]he search of the vehicle was substantially contemporaneous with defendant's arrest and probable cause existed for the arrest independent of the evidence found in the search.'"

license plate required) and Utah Code Ann. § 41-1a-1302 (1993) (unless otherwise specified, violations are class C misdemeanors). Although Utah Code Ann. § 77-7-2 (1995) purports to allow arrest for any offense committed in the presence of a peace officer, the fourth amendment and article I, section 14 require that every seizure be reasonable. This minor offense never justifies arrest. There are no public safety concerns. The offender's liberty interest far outweighs the State's interest in assuring an appearance at trial for this offense. Under the fourth amendment and article I, § 14 of the state constitution, arrest for this offense would be unreasonable. Cf. State v. Harmon, 910 P.2d 1196, 1203 (Utah 1995) (assessing fourth amendment reasonableness of arrest despite statutory authority to arrest, but deciding that unlicensed driver, presumedly unfit to drive, presented sufficient public safety risk to justify arrest).

In addition to the front plate violation, Mr. Alires was unable to produce a vehicle registration and indicated that the license he produced was suspended. The vehicle registration problem only created a reasonable suspicion. The officer needed to confirm or dispel this suspicion with dispatch, by checking motor vehicle records, before probable cause could develop. Likewise, Mr. Alires' statement that the license he produced was suspended only created a reasonable suspicion. The fact that Mr. Alires was able to produce his license is strongly indicative of the fact that it was not suspended. When a license is suspended in Utah, it is confiscated by the Motor Vehicle Department. See Utah Code Ann. §

53-3-226 (1994) (confiscation generally), Utah Code Ann. § 53-3-223(4) (Supp. 1997) (in all DUI cases, licenses are immediately confiscated). The only accurate, reliable source for suspension information is the motor vehicle computer database, accessible to the officer through dispatch. The officer could only develop probable cause that the license was suspended by checking the motor vehicle records through dispatch. Trooper Rapich did not have probable cause to arrest at the time he searched the vehicle. No actual arrest occurred until after the search, when Mr. Alires was arrested for possession of methamphetamine. R. 219. Dispatch was not called concerning the registration, VIN, or Mr. Alires' licensure status until after the search. R. 214-5, 219, 224. Under these circumstances, the search is not supportable as a search incident to arrest.

E. SUBJECTIVE INTENT IS RELEVANT TO THE EXTENT IT GOES TO WHETHER AND WHEN AN ARREST OCCURRED.

The State argues that the officer's subjective intent concerning arrest is irrelevant in this case. Not so. To successfully invoke the search incident to arrest doctrine, the State must establish that an actual arrest occurred, that the arrest was premised on probable cause established independent of the challenged search, e.g. Sibron v. United States, 392 U.S. 40, 63 (1968), and that the search was "substantially contemporaneous" with the arrest, e.g. Shipley v. California, 395 U.S. 818, 819

(1969). In determining whether and when an arrest occurred, both the officer's actions and intentions are relevant.

CONCLUSION

For the forgoing reasons, and as set forth in his opening brief, Mr. Alires respectfully requests that the trial court's denial of his motion to suppress evidence be reversed, and that the case be remanded with instructions that he be allowed to withdraw his conditional plea.

RESPECTFULLY SUBMITTED this 28th day of November, 1997.

ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to MARIAN DECKER, the Attorney General's Office, Heber M. Wells Building, 160 East 300 South 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 28th day of November, 1997.

Robert K. Heineman

DELIVERED/MAILED this _____ day of November, 1997.